FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
Press Office
Public Disclosure

FROM: Commission Secretary's Office

DATE: May 29, 2012

SUBJECT: Comments on Draft AO 2012-20
(Markwayne Mullin)

Transmitted herewith are comments from Jason Torchinsky and Shawn Sheehy, counsel for the requestor.

Draft Advisory Opinion 2012-20 was on the May 24, 2012 open meeting agenda.

Attachment

HOLTZMANVOGEL JOSEFIAK PLLC
Attorneys at Law

[redacted]

May 25, 2012

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Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2012-20 (Mullin)

Dear Commission Secretary,

These comments are submitted in response to the invitation of the Commissioners at the May 24, 2012 public hearing to submit additional comments.

THE COMMISSION HAS THE AUTHORITY UNDER 2 USC 434(f)(3)(B)(iv) TO GRANT EXCEPTIONS BY ADVISORY OPINION

The Commission has the authority to grant exceptions on a case by case basis to the electioneering communications definitions as long as no such grant of exception involves a public communication that promotes, attacks, supports or opposes a clearly identified candidate for federal office. While the statutory provision in the BCRA uses the term "regulation," the Administrative Procedure Act, 5 U.S.C § 500 *et seq.*, uses the specific term "rule" to describe government actions subject to the formal notice and comment process contained in that act.

In numerous cases, courts have determined that advisory opinions are "interpretive rules" and have not subjected such opinions to the notice and comment rulemaking of the Administrative Procedure Act. The Commission's advisory opinion process in particular has been cited as deserving of special deference given its statutory authorization, public review process, and legally binding effect. *Federal Election Commission v. NRA of Am.*, 254 F.3d 173 (D.C. Cir 2001) ("We review the Commissinn's interpretation of its own regulations pursuant to "an exceedingly deferential standard."). Additionally, the legislative history of the exemption indicates that the Senate did not use the specific term "rule" or "regulation" when describing the Commission's ability to create exceptions. The Congressional record of the provision in the

Senate said, "The FEC may promulgate additional exceptions for advertisements that do not attack, oppose, promote or support a clearly identified Federal candidate."

Additionally, other courts have construed agency opinions as interpretive rules without needing to proceed through the formal Administrative Procedure Act process. *See, e.g., Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000); *Gunderson v. Hood*, 268 F.3d 1149 (9th Cir. 2000).

LEGISLATIVE HISTORY OF THE ELECTIONEERING COMMUNICATIONS STATUTE

Following up on the Commission's request for a review of the legislative history on the electioneering communications rule and whether it sheds any additional light on this request, we reviewed the Committee on House Administration's report on BCRA, and the combined 4 days of congressional floor action in the House and Senate.

We did not find any single instance where Congress appeared to even acknowledge the possibility that a candidate for federal office might be a small business owner who legitimately seeks to run *bona fide* commercial advertisements during the time periods proceeding a primary or general election. Nearly every discussion of the electioneering communications law involved "sham issue" ads and other similarly invective comments about advertisements members of congress believed were for the purpose of influencing federal elections while eschewing the use of "magic words" of express advocacy.

Here is how the House Committee report's minority statement described the provision:

> "The Shays-Meehan bill also would provide a reasonable solution to the problem of unlimited and undisclosed advertising that fails to qualify as "express advocacy" under federal election law, even though it clearly is designed to influence the outcome of an election.... It bears emphasizing that passage of the 'electioneering communications' provision would in no way abridge the free speech rights of any group or individual. For those groups and individuals interested in promoting the election or defeat of the federal candidates of their choice, it would simply require that they play by the same rules that currently apply to candidates and political action committees. These modest burdens placed on groups and individuals seeking to engage in what most reasonable people already assume is express advocacy will not limit their ability to reach voters. In addition, the increased disclosure and disclaimer requirements will cast sunlight on political spending and fundraising by interest groups, providing voters with valuable information with which to judge their credibility and motives." House Report 107-31, Pages 50-51.

During the floor debate in the House, members made various comments about the provision, a representative sampling of which are as follows:

- "Campaign advertisements masquerading as issue advocacy must be regulated." (Statement of Rep. Jose Serrano)
- "But basically, Mr. Chairman, the Shays-Meehan bill will replace a badly broken system with one that will limit the influence of soft money and "issue" advertising in Federal campaigns and begin to restore the faith of the American people in our campaign system." (Statement of Rep. Jose Serrano)
- "The Bipartisan Campaign Finance Reform Act is the only legislation before the House which effectively deals with the dual problems of soft money and sham issue advertisements." (Statement of Rep. Jerry Costello)
- "Shays-Meehan also closes the "issue advocacy" loophole. It broadens the presently absurd definition of electioneering activity, or "express" advocacy, to include any communication that refers, in support or opposition, to a candidate. This would not prevent public organizations from running advertisements, but would ensure that ads clearly designed to influence an election are regulated under federal law. We have laws clearly designed to regulate and disclose campaign donations and expenditures, and no one should be allowed to evade them. Shays-Meehan would ensure that everyone involved in influencing elections plays by the same rules." (Statement of Rep. Robert Borski).

During the floor debate in the Senate, Senator Snowe made the following comment:

> "What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections. Every focus group and every study group that has been conducted over the last few years proves this, and I'll detail those studies later. And yet, no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning." (Statement Senator Snowe, 107th Cong. Rec. S. 2315. (March 20, 2002)).

Not a single comment in the House report, the House of Representatives floor debate, nor the U.S. Senate floor debate even remotely addressed the circumstance here - namely commercial advertising for a long established business that happens to be owned by someone running for federal office.

APPLICABILITY OF THE MEDIA EXEMPTION

We first want to address Commissioner McGahn's inquiry about the applicability of the media exemption to the weekly Mullin plumbing radio shows. After further review of the regulation and Commission advisory opinions, we do believe that the media exemption applies to exempt the radio show from the electioneering communication rules. Under the regulation, expenditures for news stories are exempt unless "the facility" is owned or controlled by the

candidate. In this particular case, and under these unique facts, Mullin Plumbing Inc. purchases an hour of air time each week for the purpose of broadcasting its home improvement radio shows. Markwayne Mullin has been on the radio for nearly 10 yearsyears, and its content consists of news and commentary about home improvement matters. (It is similar to Bob Vila's long-running television program, or shows of that nature.) "The facility" - namely the radio station itself - is not owned or controlled by Mr. Mullin. As a result, we believe these shows are protected under the media exemption in the regulation *See also Citizens United* AO-2010-08; AO 2005-16 (Fired Up! LLC); MUR 5315, 3 (In the Matter of Wal-Mart Stores, Inc.) (Statement of Reasons of Vice-Chair Smith and Commissioners Toner and Mason) (citing MUR 3607 (Northwest Airlines, Inc.) (stating that the magazine published by Northwest Airlines did constitute an illicit corporate contribution because, in part, the publisher was neither a candidate or political party or political committee)). We would ask that the Commission address the applicability of this section in its response to the advisory opinion.

However, the application of this exemption would not resolve the issue for the Requestor. Upon additional consultation with the client, we learned that the cost of the radio shows are less than $6,000 per month. If the Commission determines that the media exemption applies to the radio show, the disclaimer requirements would not apply to these shows and no reporting would be required for the costs related to the shows. We also note that the 15 seconds or so of spoken disclaimers that would be required if these shows were not exempt would take significantly less time proportionally in an hour long radio program rather than it would in the 30 and 60 second commercials that make up the bulk of the advertising at issue. This still leaves the Requestor with some $34,000 or more worth of television and radio time that would not be subject to the media exemption, and would remain subject to the disclosure and disclaimer requirements according to the draft.[1]

CONCLUSION

For the foregoing reasons, we urge the Commission to determine that the advertisements that are the subject of this particular request are *bona fide* commercial advertisements that are exempt from the electioneering communications rules.

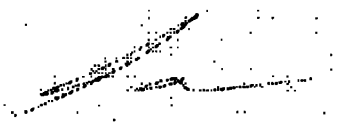
In the alternative, the Commission could conclude that the weekly home improvement radio show is exempt from coverage as an electioneering communication under the media exemption, which would have the effect of lessening the impact of the statute on a *bona fide* commercial business.

As offered before the Commission yesterday, my client would be willing to enter into a consent decree with the Commission to spare the taxpayers and our client the cost of contested litigation over a matter that at least several Commissioners agree would present a valid as-applied challenge to the rule. Although this would be an unusual outcome, the facts of this request are unique and with the electioneering communication period beginning this Sunday each

[1] We also want to note that our client has considered simply reducing his corporate advertising to below the $10,000 threshold for the next 30 days, but given that Mullin Plumbing employs more than 100 employees constant advertising at a sustained level is necessary to maintain the customer base necessary for the business to maintain its current employment levels.

day that moves forward without resolution of this matter leaves my client and his business in a legal limbo.[2]

Sincerely,



Jason Torchinsky
Shawn Sheehy
Counsel to Markwayne Mullin

[2] Additionally, we note that if the Commission issues the opinion consistent with the draft put forward by the Office of General Counsel, Mullin Plumbing will incur time and expense to redraft its advertising, re-record is advertisements, and incur additional editing time and expense to include the necessary on-screen disclaimers for the television advertisements. This is also a time consuming process and may require that advertising cease for a period of time while the changes are being made to avoid violations of the FECA.